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No. 907

In the

Supreme Court of the United States

OCTOBER TERM, 1967.

YOUNG-PETERSON CONSTRUCTION, INC.,
an Illinois corporation,

Petitioner,

vs.

THE POTOMAC INSURANCE COMPANY OF THE DISTRICT OF COLUMBIA, a corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

JOHN P. MADIGAN,
Attorney for Petitioner.

JOHN A. COOK,
SAMUEL M. LANOFF,
MORGAN, HALLIGAN, LANOFF & COOK,
33 South Clark Street,
Chicago, Illinois 60603,
Of Counsel.

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Young-Peterson Construction, Inc., a corporation, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above case on July 18, 1967.

OPINION BELOW.

The opinion of the Court of Appeals has not yet been reported and is printed as Appendix A hereto.

JURISDICTION.

The judgment of the Court of Appeals was entered on the opinion on July 18, 1967, and the Petition for Rehear-

ing was denied on August 28, 1967. On November 27, 1967, an order was entered by this court extending the time for filing a Petition for Writ of Certiorari to December 13, 1967. Jurisdiction of this court rests on 28 U.S.C., sec. 1254.

QUESTION PRESENTED.

The question presented on this petition is whether the trial court was required to follow the Illinois Insurance Code in a suit involving an Illinois corporation on a policy issued in Illinois for a theft loss, which occurred in Illinois. The code provision barred a policy defense based on false representation unless the representation was in writing. The trial court and Court of Appeals permitted the defense even though the representation, if any, was entirely oral.

STATUTES INVOLVED

Section 1652 of the Judicial Code of the United States provides:

> "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in courts of the United States, in cases where they apply." (28 U.S.C. sec. 1652).

Section 766 of the Illinois Insurance Code provides:

> "No misrepresentation or false warranty made by the insured or in his behalf in the negotiation for a policy of insurance, or breach of a condition of such policy shall defeat or avoid the policy or prevent its attaching unless such misrepresentation, false warranty, or condition shall have been stated in the policy or endorsement or rider attached thereto, or in the written application therefore, of which a copy is attached to or endorsed on the policy, and made a part thereof.

No such misrepresentation or false warranty shall defeat or avoid the policy unless it shall have been made with actual intent to deceive or materially affects either the acceptance of the risk or the hazard assumed by the company. This section shall not apply to marine or transportation insurance. 1937, June 29, Laws, 1937, p. 696, sec. 154." (Ill. Rev. Stat., (1959), Chap. 73, Sec. 766).

STATEMENT OF THE CASE

This case concerns a suit by an insured for a theft, loss of vehicles valued at $68,000.00. The insurance was covered by a written binder delivered by the general agent to the company and the loss occurred during the binder period. Federal jurisdiction was based on diversity of citizenship.

This Petition for Certiorari is concerned with the action of the court in permitting a defense not permitted by Illinois law. The defense was that the claim of the insured was barred because of false representations made by the insured in the application for insurance. The application was verbal and there was no written representation by the insured. The Illinois Insurance Code bars defenses based on false representation unless the representation is written.

The defense of misrepresentation was asserted by the insurance company for the first time in an amended pleading filed on the first day of trial. This comprised the third affirmative defense as follows:

THIRD AFFIRMATIVE DEFENSE.

"1) Prior to the verbal agreement of the defendant's agent to bind comprehensive fire and theft coverage, Young-Peterson knew that certificates of title to the tractors and trailers, without disclosure of any liens

thereon, had been endorsed and delivered, along with the keys to the tractor-trailers, by the President of Young-Peterson to Robert Holtman.

2) That when making application for comprehensive fire and theft coverage, Young-Peterson knew of and withheld and failed to disclose said facts to defendant's agent.

3) The said withheld facts materially affected the acceptance of the risk or the hazard assumed by the defendant, and the withholding and failure to disclose said facts was with actual intent to deceive the defendant, and consequently, any coverage which the defendant's agent verbally agreed to was void." (App. 29. References are to the pages of the Appendix filed in the Court of Appeals and transmitted to this court as part of the record.)

Allen Young, the non-shareholding president of the plaintiff-corporation, had delivered the title papers to Holtman as part of his fraud against the corporation and these acts caused the loss. The applicant for the binder, Jay Mullen, a principal shareholder and vice-president, was unaware of this wrongdoing. There was no evidence of any written representation by the corporation as to these facts.

There was evidence that the titles and keys were in possession of a Robert Holtman, a creditor of Young, who took the vehicles in Illinois six weeks after he had obtained possession of the title and keys from Young in Illinois. Holtman then removed the vehicles to Phoenix, Arizona, where he sold them for $55,000.00.

The opinion of the Court of Appeals was devoted to consideration of the question of the nature of the "claim of right" defense and whether the jury had sufficient evidence to support a verdict that the taking by Holtman was in the exercise of a good faith claim of right. That issue is not germane to the question of whether the writ of certiorari should issue.

Mr. David Peck, a vice-president of defendant's general agent, Lamb, Little & Co., had issued a written binder. This had been denied by the defendant but the binder was produced from defendant's records during the course of the trial and an oral admission of coverage was then made by defendant's counsel. (App. 208). The trial judge permitted a line of questioning, over objection, to David Peck, which brought into evidence Mr. Peck's opinion that he would not have bound the company if he had known that the keys and titles were in the possession of Holtman, unless he had discussed this fact with the company. The testimony on this point is set out in Appendix C.

At the close of all of the evidence, the defendant asked for an instruction in the language of its third affirmative defense. (App. 280-1). There was an extended objection that this defense was directly contrary to the Illinois Insurance Code. See Appendix D. This objection was overruled. A part of the colloquy between court and counsel is as follows:

> "[Mr. Cook] Now, I would like to read, if I may—now, this is the insurance code. I would like to hand it up to the court, if the court please—
>
> The Court: No, I would rather not see it because I have said again and again the laws of Illinois are not to be brought in to aid either side in this.
>
> Mr. Cook: This eliminates the third affirmative defense. [The defense of misrepresentation].
>
> The Court: This defense number 3 I drafted was totally without concern for the insurance law of Illinois.
>
> Mr. Cook: But it has to be related to their affirmative defense.
>
> The Court: It is simply an old equitable defense that grows out of the law of contracts, fraud in the incep-

tion. It will void any contract. Any law of Illinois notwithstanding, it will always void a contract. If there was, I don't see where there is too much room for them to argue it, that there was.

Mr. Cook: I think it is grossly unfair to this plaintiff—

The Court: But there has been some evidence of fraud. There is some testimony from a witness whom you produced to the effect that had he known certain things, if they could have known by the insurer and transmitted to him, he would not have written the binder." (App. 252; Appendix D).

The court submitted the issue to the jury as to the third affirmative defense as follows:

"The defendant also has the burden of proving, as a third defense that the insurance contract was void by reason of fraud, in that at the time the insurance contract was made, the plaintiff insured knowingly concealed from the defendant insurer, facts, which, had they been known to the defendant insurer, would have caused the defendant not to have entered into the contract.

"If you find from your consideration of all of the evidence that each of the propositions required of the plaintiff has been proved and that none of the defendant's defenses has been proved, then your verdict should be for the plaintiff.

"If, on the other hand, you find from your consideration of all of the evidence that any of the propositions the plaintiff is required to prove have not been proved or that any of the defendant's defenses have been proved, then your verdict should be for the defendant." (App. 258-9).

The error of the trial judge in permitting this defense in view of the mandatory requirement of the Insurance Code was argued fully in plaintiff's opening brief in the Court of Appeals (entire point IV). The Petition for Rehearing was devoted to that point alone.

The judgment of the Court of Appeals against the plaintiff was based on an opinion which dismissed this point, among others, by simply stating, at the close, that "We have considered all of these contentions and find them lacking in merit . . .". (Op. p. 6).

ARGUMENT

The question on this petition is whether the refusal of the trial judge and the Court of Appeals to apply Illinois statute law is of such serious moment as to require the writ of certiorari.

The trial judge was direct in rejecting Illinois law. After extended argument, the court simply chose to disregard the statute and apply general rules of fraud:

> "The Court: No, I would rather not see it because I have said again and again the laws of Illinois are not to be brought in to aid either side in this.
>
> Mr. Cook: This eliminates the third affirmative defense. [The defense of misrepresentation].
>
> The Court: This defense number 3 I drafted was totally without concern for the insurance law of Illinois.
>
> Mr. Cook: But it has to be related to their affirmative defense.
>
> "The Court: It is simply an old equitable defense that grows out of the law of contracts, fraud in the inception. It will void any contract. Any law of Illinois notwithstanding, it will always void a contract. (A. 252; Appendix D)

The Court of Appeals was indirect but just as effectively rejected Illinois law. It simply stated that the "plaintiff makes certain additional contentions asserting error in the giving of an instruction to which it objected * * *", and that "we have considered all of these contentions and find them lacking in merit in that none of the matters complained of reveal any error, on the record here involved, which would require reversal." (Op. 5-6).

The effect of the decision of both courts is, of course, identical. Plaintiff was deprived of a trial of the issues within long established rules of law. Plaintiff made extended objection to the action of the trial judge in permitting the defense and emphasized the seriousness of the ruling on this point (App. 250-256; Appendix D). Plaintiff was not making a mere tactical point for appeal but was bending every effort to prevent the trial judge from putting the issue as a matter of general contract law and from refusing to be bound by the requirement of the Illinois statute. The refusal to follow Illinois law was so irregular and such a deviation from accepted practice as to effectively destroy plaintiff's right to a jury trial, to the equal protection of the law, and to elemental due process.

Sec. 1652 of the Judicial Code, sometimes known as the "Rules of Decision Act" has had a long history. Section 1652 is a restatement of section 34 of the original Judiciary Act of 1789—broadening that section so as to make it applicable to "civil actions" and not merely to "trials at common law", (Sec. 34 of the Judiciary Act is stated in 28 U.S.C., sec. 725 (1940); now 28 U.S.C.A., sec. 1652; for full discussion see Moore's Federal Practice, 2nd ed., vol. 1A, sec. 0.302 [1] and 0.305 [1].

Such a ruling is a matter which should be of concern to this court. Section 766 of the Illinois Insurance Code is a remedial statute. Aldrich "Waiver (n)or Estoppel, 1964 Illinois Law Forum 342, at p. 344. In requiring that a claimed misrepresentation be in writing, the statute was obviously designed to protect the insured against the construction of fraud defenses after the loss occurred. This case involved an Illinois insurance policy, an Illinois loss, and an Illinois corporation. Section 1652 of the Judicial Code requires that Illinois law be applied. This court must recognize that it has allowed certiorari or

taken appeals in a variety of cases under Section 1652 where the lower courts have applied state law erroneously. (See Moore's Federal Practice, 2nd ed., vol. 1A, sec. 0.302 [3], 0.302 [4], 0.306.) Yet, here is a case in which the lower courts have refused to apply state law in the first instance—in direct contravention of the statute. If it is error to interpret wrongly, the error is indeed amplified by the refusal to apply the statutory requirement in the first instance.

The court here is not being asked to consider this case merely because a different interpretation than that adopted by the Court of Appeals is possible. Lawyers who try cases come soon to the recognition that they are advocates and that the interpretation of law by the courts and of facts by the juries may differ from their own. But that recognition is grounded on the realization that, on fundamental questions, lawyers and litigants can rely on the rule of law rather than the rule of men. That doctrine is basic to our jurisprudence and entitles the plaintiff, even in this entirely private litigation, to the protection of this court.

Let us put it another way. Every litigant in every Federal Court has the right to have his case heard in accordance with the substantive law of the state. The only exception is the exception in Section 1652, "where the Constitution or treaties of the United States or Acts of Congress, otherwise require". Yet, in this case, on an important and controlling issue, the jury was instructed to find according to general law and in denial of the statutory protection given to the insured. Such action was wrong and wrong, not on a question of interpretation but, on a question of basic right—the right of the litigant in a Federal Court to the same rule of law which would be applied in a state court.

The Court of Appeals has glossed over the issues so that the fabric of the law appears intact. Formally, there has been no invasion of the clear requirement of Section 1652, but in substance there has and this court is known as one which looks to the substance of what has taken place rather than to its form. In short, this case should be considered for what it is: an unequivocal holding by the Court of Appeals that it will not apply Illinois statute law where the trial judge has determined that general, but contrary, rules of decisional law should be applied. A rule of law so stated should not be allowed to stand.

This ruling of the trial judge was not mere harmless error but went to the heart of plaintiff's case. Plaintiff could prevail on every other aspect of the case yet be denied its relief because the jury was directed to consider whether there was misrepresentation in obtaining the insurance. Under the law of Illinois, that issue cannot be in the case unless the claimed misrepresentation be in writing. In the Federal Court, this plaintiff was given a different case and a different rule of law than it would have had in the state court and was denied the protection of Section 1652 of the Judicial Code and Section 766 of the Illinois Insurance Code.

The trial judge chose to follow an "old equitable defense that grows out of the law of contracts" (Appendix D) rather than the Illinois Insurance Code which was applicable to this insurance contract. He thereby took unto himself a power which he did not have. In the words of Mr. Justice Holmes, his was "an unconstitutional assumption" of power "which no lapse of time or respectable array of opinion should make us hesitate to correct." *Black and White Taxicab & Transfer Company* v. *Brown and Yellow Taxicab & Transfer Company,* 276 U.S. 518, at 533, dissenting opinion, (1927). Ten years later, the

rule of the dissent became law in *Erie Railroad Company* v. *Tompkins,* 304 U.S. 64 (1937). In overruling the doctrine of *Swift* v. *Tyson,* 16 Pet. 1, this court expressly recognized the unconstitutionality of applying general law which differed from the law of the state:

> "Thus, the doctrine [of *Swift* v. *Tyson*] rendered impossible equal protection of the law. In attempting to promote uniformity of law throughout the United States, the doctrine had prevented uniformity in the administration of the law of the State.
>
> "The discrimination resulting became in practice far reaching. This resulted in part from the broad province accorded to the so-called 'general law' as to which federal courts exercised an independent judgment." (at p. 75)

The trial judge, in electing to follow general law has turned back beyond *Erie* v. *Tompkins,* beyond *Swift* v. *Tyson,* and beyond the Rules of Decision Act to some vague and transcendental body of law different from and superior to the statute law of Illinois. The Court of Appeals, in its decision, approved that election with no more reason, in either court, than an unexplained desire to apply a new and special rule of law to this litigation. Plaintiff is now in the position where its only available relief against this unconstitutional and arbitrary decision is in this court.

Rule 19 permits certiorari where a court of appeals is in conflict with the decisions of other courts of appeals, or has decided a federal question in a way in conflict with applicable decisions of this court, or has so far departed from the accepted and usual course of judicial proceedings or has sanctioned such a departure by the lower court as to call for an exercise of this court's power of supervision. Tested against Rule 19, the action of the trial judge in adopting general law over applicable statute law and of

the Court of Appeals in approving that act is so unusual, so contrary to the decisions of this court, and so neglectful of the mandatory application of state law in federal courts, as to justify the request of petitioner for the writ of certiorari.

Respectfully submitted,

JOHN P. MADIGAN,
Attorney for Petitioner.

JOHN A. COOK,
SAMUEL M. LANOFF,
MORGAN, HALLIGAN, LANOFF & COOK,
33 South Clark Street,
Chicago, Illinois 60603,
Of Counsel.